

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RAY S. LOBB,

$$\begin{array}{c}) \\) \\) \\) \\) \\) \\) \\) \\) \\) \end{array}$$

No. 05-469-HU

FINDINGS AND RECOMMENDATION

Ray S. Lobb
7948 S.W 166th Place
Beaverton, Oregon 97007
Pro se

Karin J. Immergut
United States Attorney
District of Oregon
1000 S.W. Third Avenue, Suite 600
Portland, Oregon 97204
Jeremy N. Hendon
Trial Attorney, Tax Division
United States Department of Justice
Ben Franklin Station
P.O. Box 683
Washington, D.C. 20044
Attorneys for United States of America

HUBEL, Magistrate Judge:

1 Plaintiff Ray S. Lobb brought this action *pro se*, asserting
2 jurisdiction under 28 U.S.C. § 1367, and two claims for relief,
3 which he has designated "Complaints." Complaint #1 alleges that the
4 defendant has filed liens and levies against Mr. Lobb, and that Mr.
5 Lobb believes that he is not a "person liable" for taxes on income
6 pursuant to 26 C.F.R. § 1.61-1 because his income is not wages or
7 self-employment income, and because he has chosen not to volunteer
8 to sign a Form 1040.

9 Complaint # 2 is a challenge to the existence or amount of his
10 tax liability for 1999 and 2000.

11 Mr. Lobb seeks "cessation of all collection actions" by the
12 United States, removal of all liens and levies assessed against
13 him, and reimbursement of funds levied against his Social Security
14 check.

15 The United States moves to dismiss both claims for relief
16 under Rule 12(b)(1) if the Federal Rules of Civil Procedure: the
17 first because it improperly seeks to restrain the Internal Revenue
18 Service's ability to collect federal taxes and/or improperly seeks
19 a declaration regarding federal taxes; and the second because it is
20 a claim brought pursuant to 26 U.S.C. § 6330, which should have
21 been brought in the United States Tax Court.

22 **Factual Background**

23 According to the Declaration of Jeremy Hendon, Exhibit A, on
24 May 13, 2004, the IRS notified Mr. Lobb of its intent to levy under
25 26 U.S.C. § 6331 his outstanding federal income tax liabilities. On
26 May 17, 2004, the IRS notified Mr. Lobb of its intent to levy a
27

1 federal tax lien. Mr. Lobb appealed these determinations on the
2 ground that the math was not correct. Id.

3 On November 10, 2004, Mr. Lobb was asked to contact the IRS no
4 later than November 29, 2004, to schedule an appeals hearing. Mr.
5 Lobb was told that the hearing would be his opportunity to discuss
6 collection alternatives, such as an offer in compromise or an
7 installment agreement. Id. However, in order to qualify for such
8 alternatives, Mr. Lobb would be required to file tax returns for
9 2001, 2002 and 2003. Id.

10 Mr. Lobb did not respond to that letter. The IRS sent another
11 letter on November 30, 2004, requesting a response by December 16,
12 2004. Id. Mr. Lobb responded by letter that because of the holiday
13 season, he would respond on January 19, 2005. Id.

14 Mr. Lobb sent the IRS a letter dated January 19, 2005, saying
15 he had health issues and requesting another week to provide a
16 response. However, after two weeks without a response from Mr.
17 Lobb, the IRS Appeals Officer proceeded to evaluate his appeal
18 without a hearing. Id.

19 On March 3, 2005, the IRS sent, via certified mail, a Notice
20 of Determination Concerning Collection Action(s) Under Section 6320
21 and/or 6330 ("Notice of Determination") for the underlying income
22 tax liabilities. Id. The Notice of Determination stated that Mr.
23 Lobb had failed to provide any detailed information about what he
24 meant when he said the math was incorrect, and did not respond to
25 the IRS's attempt to schedule a hearing or offer any viable
26 collection alternatives; it stated further that the IRS had
27

1 complied with applicable laws, regulations and administrative
2 procedures. Id.

3 Mr. Lobb filed this action on April 4, 2005.

4 **Standards**

5 A motion under Rule 12(b)(1) addresses the court's subject
6 matter jurisdiction. When deciding a motion under Rule 12(b)(1),
7 the court must view the pleaded facts "favorably." McNatt v. Apfel,
8 201 F.3d 1084, 1087 (9th Cir. 2000). A jurisdictional challenge
9 under Rule 12(b)(1) may be made either on the face of the pleadings
10 or by presenting extrinsic evidence. White v. Lee, 227 F.3d 1214,
11 1242 (9th Cir. 2000); Warren v. Fox Family Worldwide, Inc., 328 F.3d
12 1136, 1139 (9th Cir. 2003). Thus, when considering a motion to
13 dismiss pursuant to Rule 12(b)(1), the court is not restricted to
14 the face of the pleadings, but may review any evidence, such as
15 affidavits and testimony, to resolve factual disputes about the
16 existence of jurisdiction. McCarthy v. United States, 850 F.2d
17 5587, 560 (9th Cir. 1988). The burden of establishing subject matter
18 jurisdiction rests upon the party asserting jurisdiction. Kokkonen
19 v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994).

20 **Discussion**

21 The government asserts that Mr. Lobb's first claim, that he is
22 not a "person liable" for taxes on income, should be dismissed for
23 lack of jurisdiction because the claim is one seeking to prevent
24 the IRS from collecting Mr. Lobb's outstanding federal taxes. Under
25 the terms of the Anti-Injunction Act, 26 U.S.C. § 7421, and the
26 Declaratory Judgment Act, 28 U.S.C. § 2201, the United States has
27

1 not waived sovereign immunity with respect to such claims. The
2 Anti-Injunction Act provides that "no suit for the purposes of
3 restraining the assessment or collection of any tax shall be
4 maintained in any court by any person." 26 U.S.C. § 7421(a). The
5 Declaratory Judgments Act also contains an exception for cases
6 "with respect to Federal taxes," 28 U.S.C. § 2201.

7 An action whose purpose is to restrain the assessment and
8 collection of taxes is barred by the Anti-Injunction Act. Alexander
9 v. "Americans United" Inc., 416 U.S. 752 (1974); Elias v. Connett,
10 908 F.2d 521, 523 (9th Cir. 1990). Although there are statutory and
11 judicial exceptions to the Act, the court must dismiss for lack of
12 subject matter jurisdiction any suit that does not fall within one
13 of the exceptions to the Act. Elias, 908 F.2d at 523. It is the
14 taxpayer's burden to satisfy one of the exceptions to the Act if he
15 is not to be jurisdictionally barred from seeking relief. Id. Mr.
16 Lobb has not claimed that this action falls within one of the
17 exceptions to the Act.

18 The government moves to dismiss Mr. Lobb's second claim for
19 relief because it is brought in the wrong court. Under 26 U.S.C. §
20 6330(d)(1), when an underlying income tax liability is challenged
21 in a collection due process hearing, judicial review over any
22 determination made in the hearing lies with the United States Tax
23 Court, not the district court. See also Treas. Reg. § 301.6330-
24 1T(f)(2), Q-F3/A-F3: "If the Tax Court would have jurisdiction over
25 the type of tax specified in the [collection due process] notice
26 (for example, income and estate taxes), then the taxpayer must seek
27

1 judicial review by the Tax Court."

2 I agree with the government that this court has no
3 jurisdiction over Mr. Lobb's two claims for relief.

4 Mr. Lobb filed opposition to the government's motion to
5 dismiss on July 5, 2005, July 11, 2005, and July 15, 2005 (doc. ##
6 12, 13, 17, 20, 21). On August 3, 2005, plaintiff filed a "Motion
7 to Vacate." (doc. 28). The motion states that Mr. Lobb submits the
8 motion to vacate

9 subject to 26 U.S.C. based upon the incompatibility of
10 the Original Complaint filed, with the facts of the case.
11 It appears to Plaintiff that the problem cannot be
resolved in a civil action.

12 Filed with the Motion to Vacate is a Memorandum, stating that
13 Mr. Lobb "concedes that the current action to get relief may not be
14 sustainable" and that "[p]laintiff's failure to clearly indicate a
15 legal claim is probably correct," but that the "Anti-Trust [sic]
16 and Declaratory Judgment Acts arguments by Defendant appear to be
17 frivolous in this case, as is the payment of non existent tax and
18 the preposterous legal hoops required to get it back." The court
19 construes Mr. Lobb's motion to vacate as a concession that the
20 court lacks subject matter jurisdiction over his claims.¹

21 I recommend that the defendant's motion to dismiss (doc. # 6)
22 for lack of subject matter jurisdiction be GRANTED.
23

24
25 ¹The Memorandum continues with the contentions that the term
26 "United States of America" must be "clearly defined pursuant to
27 pertinent sections of 26 U.S.C.," and that the subject matter of
this action constitutes a commercial transaction subject to the
Uniform Commercial Code. I find these contentions without merit.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

If objections are filed, a response to the objections is due September 22, 2005, and the review of the Findings and Recommendation will go under advisement on that date.

/s/ Dennis James Hubel

Dennis James Hubel
United States Magistrate Judge